2-6-2013

State v. Juarez Appellant's Brief Dckt. 40135

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. JUAN L. JUAREZ, Defendant-Appellant.	)	NO. 40135 BLAINE COUNTY NO. CR 2011-2386 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

HONORABLE ROBERT J. ELGEE
District Judge

SARA B. THOMAS
State Appellate Public Defender
State of Idaho
I.S.B. #5867

ERIK R. LEHTINEN
Chief, Appellate Unit
I.S.B. #6247

SPENCER J. HAHN
Deputy State Appellate Public Defender
I.S.B. #8576
3050 N. Lake Harbor Lane, Suite 100
Boise, ID 83703
(208) 334-2712

ATTORNEYS FOR
DEFENDANT-APPELLANT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR
PLAINTIFF-RESPONDENT

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STATEMENT OF THE CASE

Nature of the Case

Juan Juarez appeals from the judgment of conviction entered following his court trial on a charge of felony DUI. On appeal, he asserts that the district court erred when it concluded that Nevada's DUI statute was a substantially conforming foreign criminal violation under Idaho Code § 18-8005(10). As such, his conviction for felony DUI must be vacated, with this matter remanded to the district court for entry of a conviction for misdemeanor DUI.

Statement of the Facts and Course of Proceedings

Juan Juarez was charged by Amended Information with driving while under the influence of intoxicants (*hereinafter,* DUI), which was elevated to a felony based on allegations that he had been twice convicted within the preceding ten years of "substantially conforming foreign criminal violation[s]," once in Nevada and once in California.[1] (R., pp.51-52.) Mr. Juarez and the State agreed to waive a jury trial in this matter because the main issue in dispute was whether the statute for which the Nevada conviction was entered was a substantially conforming foreign criminal violation under Idaho Code § 18-8005(10).[2] The district court accepted the waiver. (Tr., p.9, L.10 – p.14, L.15.) Mr. Juarez then pled guilty to the facts constituting a misdemeanor DUI, as set forth in Count One, Part One, leaving only the facts set forth in Count One, Part

[1] Mr. Juarez was also charged with two misdemeanors. (R., pp.52-53.) Those charges were subsequently dismissed on the prosecutor's motion. (R., pp. 66-68, 132-34.)

[2] Defense counsel expressly waived any argument that the California statute was not a substantially conforming foreign criminal violation. (Tr., p.38, Ls.15-17 ("My argument as to the substantially conforming law, that part of the argument relates only to the Nevada statute, not to the California statute.").)

Two, dealing with the prior convictions enhancement, in dispute. (Tr., p.27, L.10 – p.35, L.5.)

The parties briefed and argued the issue[3] (R., pp.70-104; *see generally*, Tr.), after which the district court concluded that the Nevada DUI statute was a substantially conforming foreign criminal violation under Idaho Code § 18-8005(10). (Tr., p.99, L.25 – p.100, L.7.) After a court trial at which the only issue was whether Mr. Juarez was the person named in the California and Nevada judgments of convictions (Tr., p.106, L.14 – p.108, L.12), the district court found Mr. Juarez guilty of felony DUI. (Tr., p.157, Ls.1-5.) Following his sentencing, Mr. Juarez filed a Notice of Appeal timely from the entry of the judgment of conviction. (R., p.136.)

[3] An additional issue concerned whether the Nevada conviction could be used to elevate Mr. Juarez's Idaho charge in light of the fact that Nevada law does not allow for a jury trial on a first DUI offense. (Tr., p.55, L.22 – p.56, L.6.) Mr. Juarez does not pursue that issue on appeal.

ISSUE

Is Nevada's DUI statute a substantially conforming foreign criminal violation under Idaho Code § 18-8005(10)?

ARGUMENT

Nevada's DUI Statute Is Not A Substantially Conforming Foreign Criminal Violation Under Idaho Code § 18-8005(10)

A. Introduction

Mr. Juarez was charged with DUI, which was elevated to a felony pursuant to Idaho Code § 18-8005(6) based on allegations that Mr. Juarez had twice been convicted of "substantially conforming criminal violation[s]," once in California and once in Nevada, within the preceding ten years. (R., pp.51-52.) On appeal, Mr. Juarez asserts that the district court erred when it concluded that Nevada's DUI statute was a substantially conforming foreign criminal violation under Idaho Code § 18-8005(10).

B. Standard Of Review

"The determination of whether a foreign criminal violation is substantially conforming is a question of law to be determined by the court." I.C. § 18-8005(10).

C. Nevada's DUI Statute Is Not A Substantially Conforming Foreign Criminal Violation Under Idaho Code § 18-8005(10)

Idaho Code § 18-8005(6), in relevant part, provides:

> Except as provided in section 18-8004C, Idaho Code, any person who pleads guilty to or is found guilty of a violation of the provisions of section 18-8004(1)(a), (b) or (c), Idaho Code, who previously has been found guilty or has pled guilty to two (2) or more violations of the provisions of section 18-8004(1)(a), (b) or (c), Idaho Code, *or any substantially conforming foreign criminal violation*, or any combination thereof, within ten (10) years, notwithstanding the form of the judgment(s) or withheld judgment(s), shall be guilty of a felony . . . .

I.C. § 18-8005(6) (emphasis added).

Idaho Code § 18-8005(10) provides,

> For the purpose of subsections (4), (6) and (9) of this section and the provisions of section 18-8004C, Idaho Code, a substantially conforming foreign criminal violation exists when a person has pled guilty to or has

> been found guilty of a violation of any federal law or law of another state, or any valid county, city, or town ordinance of another state substantially conforming to the provisions of section 18-8004, Idaho Code. The determination of whether a foreign criminal violation is substantially conforming is a question of law to be determined by the court.

I.C. § 18-8005(10).

In *State v. Schmoll*, 144 Idaho 800 (Ct. App. 2007), the Idaho Court of Appeals considered an issue of first impression in Idaho, namely "which factors to compare and the standard with which to compare them" in determining whether an out-of-state conviction was a "substantially conforming foreign criminal violation" under what was then Idaho Code § 18-8005(8).[4] *Schmoll*, 144 Idaho at 803. At issue in *Schmoll* was Montana's felony DUI statute, which was being used as the basis to elevate a DUI to a felony in Idaho. Under the Montana statute, "a fourth or subsequent DUI conviction within the defendant's lifetime is automatically a felony." *Id.* at 801. Schmoll sought to strike the felony enhancement, asserting that the Montana statute under which he was convicted was not a substantially conforming foreign criminal statute because the Montana "conviction could not have been charged as a felony if brought in Idaho." *Id.*

The Court of Appeals began by noting that, in enacting what was then Idaho Code § 18-8005(8), "The legislature expressly provided that the focus of the comparison should be on the elements of the statutes, and not the specific conduct giving rise to the prior violation." *Id.* It further explained, "Substantial conformity does not require exact correspondence between the two statutes." *Id.* at 804 (citing BLACK'S LAW DICTIONARY). Although the key issue before the district court concerned whether the statutes were substantially conforming with respect to the States' respective felony DUI provisions, the

[4] The provision has since been renumbered to § 18-8005(10).

Court of Appeals began its analysis by considering the elements of the DUI statutes, rather than the enhancement provisions. *Id.* at 803-04.

In comparing the Montana and Idaho statutes, the Court of Appeals noted that Montana does not have a *per se* DUI law[5]; under Montana law if the testing "reveals a concentration of 0.08 or more, there is a rebuttable inference that the person was in fact under the influence of alcohol when driving." *Id.* at 804 (citing M.C.A. § 61-8-401(1)(a) (2005)). The Court of Appeals explained the difference with Idaho law, noting, "Idaho does not consider a BAC of 0.08 or more as merely rebuttable evidence of being under the influence either; it is a *per se* violation of the statute to drive with a BAC of 0.08 or more." *Id.* (citing I.C. § 18-8004(1)(a)). Regardless of this difference, the Court of Appeals found it significant that both statutes "prohibit the same essential conduct – driving while under the influence of alcohol." *Id.* It further noted, "Proving that a person is under the influence absent a BAC test requires a greater degree of impairment in Montana than in Idaho, since in Idaho, the ability to be impaired 'to the slightest degree,' while in Montana, the ability to drive 'safely' is the quality that must be diminished." *Id.* In conclusion, the Court of Appeals noted, "Montana's higher standard surpasses the elements required for a violation in Idaho. These two statutes frame their prohibitions using the same language, requiring substantially conforming elements to be met to sustain a violation." *Id.*

With respect to the argument advanced by Schmoll before the district court-that the Montana statute did not substantially conform to the Idaho statute because his

[5] In Idaho, a person may be convicted of DUI (alcohol) one of two ways: (1) if that person was "under the influence" of alcohol; *or* (2) if that person has a blood alcohol concentration of 0.08 or more at the time of driving (the *per se* law). I.C. § 18-8004(1)(a).

Montana conviction would not have been a felony under Idaho law-the Court of Appeals concluded that the argument was "misplaced" in light of Idaho Code I.C. § 18-8005(8)'s express provision "that the comparison is between section 18-8004 and the foreign state statute that was violated . . . [which] is entirely independent from the consideration of whether the violation results in a misdemeanor charge or a felony charge." *Id.* at 804-05.

The second, and thus far only other, time that an Idaho appellate court has considered whether an out-of-state statute is a substantially conforming foreign criminal violation was in *State v. Moore*, 148 Idaho 887 (Ct. App. 2010). In *Moore*, the Idaho Court of Appeals considered North Dakota's DUI statute. Noting that *Schmoll* requires "that the focus of the inquiry is the elements of the statute as opposed to the underlying conduct," the Court of Appeals concluded that North Dakota's statute substantially conformed to Idaho's because "both statutes 'prohibit the same essential conduct – driving while under the influence of alcohol' and 'frame their prohibitions using the same language, requiring substantially conforming elements to be met to sustain a violation.'" *Moore*, 148 Idaho at 898 (quoting *Schmoll*, 144 Idaho at 804).

At the time of Mr. Juarez's Nevada conviction, Nevada Revised Statute 484.379,[6] in relevant part, provided:

> 1. It is unlawful for any person who:
>
> (a) Is under the influence of intoxicating liquor;
>
> (b) Has a concentration of alcohol of 0.08 or more in his blood or breath; or
>
> (c) Is found by measurement *within 2 hours after driving or being in actual physical control of a vehicle* to have a concentration of alcohol of 0.08 or more in his blood or breath,

[6] The statute has since been renumbered as Nevada Revised Statute 484C.110.

to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access.

. . .

4. If consumption is proven by a preponderance of the evidence, it is an *affirmative defense* under paragraph (c) of subsection 1 that the defendant consumed a sufficient quantity of alcohol after driving or being in actual physical control of the vehicle, and before his blood or breath was tested, to cause him to have a concentration of alcohol of 0.08 or more in his blood or breath. A defendant who intends to offer this defense at a trial or preliminary hearing must, not less than 14 days before the trial or hearing or at such other time as the court may direct, file and serve on the prosecuting attorney a written notice of that intent.

. . . .

(State's Exhibit No. 3 (emphases added).)

Idaho Code § 18-8004, in relevant part, provides:

(1)(a) It is unlawful for any person who is under the influence of alcohol, drugs or any other intoxicating substances, or any combination of alcohol, drugs and/or any other intoxicating substances, or who has an alcohol concentration of 0.08, as defined in subsection (4) of this section, or more, as shown by analysis of his blood, urine, or breath, to drive or be in actual physical control of a motor vehicle within this state, whether upon a highway, street or bridge, or upon public or private property open to the public.

. . .

(2) Any person having an alcohol concentration of less than 0.08, as defined in subsection (4) of this section, as shown by analysis of his blood, urine, or breath, by a test requested by a police officer shall not be prosecuted for driving under the influence of alcohol, except as provided in subsection (3), subsection (1)(b) or subsection (1)(d) of this section. Any person who does not take a test to determine alcohol concentration or whose test result is determined by the court to be unreliable or inadmissible against him, may be prosecuted for driving or being in actual physical control of a motor vehicle while under the influence of alcohol, drugs, or any other intoxicating substances, on other competent evidence.

(3) If the results of the test requested by a police officer show a person's alcohol concentration of less than 0.08, as defined in subsection (4) of this section, such fact may be considered with other competent evidence of drug use other than alcohol in determining the guilt or innocence of the defendant.

. . .

> (5) "Actual physical control" as used in this section, shall be defined as being in the driver's position of the motor vehicle with the motor running or with the motor vehicle moving.
>
> . . . .

I.C. § 18-8004.

There are two glaring difference in the elements between the Idaho and Nevada DUI statutes. The first is that in Nevada, in addition to being unlawful to drive while under the influence of alcohol or with a blood alcohol concentration of 0.08, it is also unlawful to have a blood alcohol concentration of 0.08 or greater *within* two hours of driving, regardless of whether the person's blood alcohol concentration was below 0.08 at the time of driving. In contrast, Idaho's statute criminalizes the act of driving (or being in physical control) *while* under the influence of alcohol (whether actually under the influence or under the *per se* standard of 0.08 or greater). As relevant to this difference, in *Schmoll* the Court of Appeals concluded that the two statutes at issue were substantially conforming because both statutes "prohibit the same essential conduct – *driving while* under the influence of alcohol . . . ." *Schmoll*, 144 Idaho at 804 (emphasis added). The plain language of the Nevada statute prohibits different conduct than Idaho's statute, namely Nevada's statute also criminalizes driving *followed by* a blood alcohol concentration of 0.08 or greater *within two hours of driving.*

Any attempt to argue that the statute's provision of an affirmative defense that the person consumed sufficient alcohol between driving and being tested renders the elements substantially conforming must fail because an affirmative defense does not create an element, a concept well-established in law. *See State v. Huggins*, 105 Idaho 43, 45 (1983) ("We hold, therefore, that under Idaho's current statutory scheme relating

to rape, nonmarriage is not an essential element of the crime of rape; rather, the existence of a marital status between the victim and the accused is an affirmative defense which must be placed in issue by the accused."). Therefore, Nevada's statutory provision establishing an affirmative defense that a person consumed sufficient alcohol between driving and being tested is not relevant to the *elements*-focused test set forth by the Idaho Court of Appeals in *Schmoll* and *Moore*.

The second glaring difference in elements between the two DUI statutes is that, under the elements of Nevada's statute, a person may be prosecuted for DUI (alcohol) even if the person's blood alcohol concentration is below 0.08 at the time of driving. Under Idaho law, the State is prohibited from prosecuting a person for DUI (alcohol) if the person's blood alcohol concentration is below 0.08 at the time of driving. I.C. § 18-8004(2). An implied element of Idaho's DUI (alcohol) statute, therefore, is that the person's blood alcohol concentration, when such a result is available and reliable, was above 0.08 at the time of driving, regardless of whether the crime was charged as a *per se* violation or under the actual impairment language prohibiting driving while "under the influence." That is, the term "under the influence" in Idaho's DUI (alcohol) statute necessary excludes from its definition a person who has a blood alcohol concentration of less than 0.08 as shown by a reliable and admissible chemical test. Such an element is absent from Nevada's statute.

In light of the elements-focused test adopted by the Court of Appeals in *Schmoll* and affirmed in *Moore*, the two major differences in elements between the Idaho and Nevada DUI statutes render it impossible to conclude that the Nevada DUI statute substantially conforms to Idaho's DUI statute. As such, the judgment of conviction for

felony DUI must be vacated, with the matter remanded for entry of a judgment of conviction for misdemeanor DUI.

CONCLUSION

For the reasons set forth herein, Mr. Juarez respectfully requests that this Court hold that Nevada's DUI statute is not a substantially conforming foreign criminal violation under Idaho Code § 18-8005(10), vacate the judgment of conviction for felony DUI, and remand this matter for entry of a judgment of conviction for misdemeanor DUI.

DATED this 6th day of February, 2013.

SPENCER J. HAHN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 6th day of February, 2013, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

JUAN L JUAREZ
INMATE 104378
NICI
236 N RADAR RD
COTTONWOOD ID 83522

ROBERT J ELGEE
DISTRICT COURT JUDGE
E-MAILED BRIEF

DANIEL M DOLAN
CAMAS COUNTY PUBLIC DEFENDER
E-MAILED BRIEF

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
PO BOX 83720
BOISE ID 83720-0010
Hand delivered to Attorney General's mailbox at Supreme Court.

EVAN A. SMITH
Administrative Assistant

SJH/eas